



U.S. MERIT SYSTEMS PROTECTION BOARD

Case Report for March 24, 2023

Note: These summaries are descriptions prepared by individual MSPB employees. They do not represent official summaries approved by the Board itself, and they are not intended to provide legal counsel or to be cited as legal authority. Instead, they are provided only to inform and help the public locate Board precedents.

BOARD DECISIONS

Appellant: Mary A. Abbott

Agency: Department of Justice

Decision Number: [2023 MSPB 14](#)

Docket Numbers: DC-0752-12-0366-X-1; DC-0752-12-0366-X-2

Issuance Date: March 23, 2023

Appeal Type: Adverse Action by Agency

SUSPENSION

COMPLIANCE

BACK PAY

The appellant was employed as an EAS-17 Supervisor for the agency. Effective February 8, 2012, the agency placed her on enforced leave because there was no work available within her medical restrictions. The appellant filed a Board appeal, and the Board found that it had jurisdiction over the appellant's enforced leave as a constructive suspension. On or about February 7, 2012, the appellant applied for disability retirement with the Office of Personnel Management (OPM), which OPM granted effective June 4, 2012, terminating the appellant's employment. During subsequent proceedings, the Board issued an order reversing the appellant's constructive suspension and ordering the agency to cancel the suspension and to pay the appellant the correct amount of back pay, with interest, and provide other benefits as appropriate. The Board found that the appellant failed to prove her affirmative defense of

disability discrimination.

The appellant filed two petitions for enforcement, which an administrative judge granted in two compliance initial decision. As relevant here, the administrative judge found the agency not in compliance as to both the back pay award, which was to continue beyond the appellant's retirement, and the cancellation of the suspension action. Neither party filed a petition for review. The Board joined the compliance proceedings and addressed the outstanding compliance issues.

Holding: The agency provided sufficient evidence of compliance with its obligations to cancel the enforced leave constructive suspension and to award the appellant back pay.

1. The agency offered sufficient evidence demonstrating compliance with the administrative judge's order to cancel the enforced leave constructive suspension action. Based on the nature of the action, the only documentation reflecting the suspension was the enforced leave letter, and the agency's sworn statement that it had removed the letter from the appellant's personnel file was sufficient to demonstrate compliance.
2. As to the scope of the back pay award, the Board reopened the prior compliance cases on its own motion under 5 C.F.R. § 1201.118 and modified the compliance initial decisions to find that the appellant was not entitled to back pay for the period following her disability retirement. The Board's authority under the Back Pay Act extended to granting back pay relating to the corrected action, i.e., the constructive suspension. To grant continued back pay beyond the reversed suspension would be tantamount to granting back pay for the termination of her employment, i.e., a removal or constructive removal action, which was not before the Board. The Board rejected the appellant's argument that the Board had authority to grant back pay for an unappealed personnel action, i.e., her alleged constructive removal. The appellant reasoned that the agency's disability discrimination led to her disability retirement. The Board was unpersuaded, observing that it had expressly found no discrimination. Thus, the back pay period ended on the date of the appellant's retirement.
3. The Board further found that the agency paid the appellant the full amount of back pay and benefits owed, including interest, and the deductions it made were correct and required by law and OPM regulations.

Accordingly, the Board found the agency in compliance with the Board's order

and dismissed the joined petitions for enforcement.

Appellant: Darek J. Kitlinski

Agency: Department of Justice

Decision Number: [2023 MSPB 13](#)

Docket Number: SF-4324-15-0088-M-1

Issuance Date: March 23, 2023

Appeal Type: Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA)

USERRA RETALIATION JURISDICTION

The U.S. Court of Appeals for the Federal Circuit (Federal Circuit) previously remanded this USERRA appeal for the Board to address whether it has jurisdiction over the appellant's 38 U.S.C. § 4311(b) retaliation claim, alleging that the agency retaliated against him for prior USERRA activity by creating a hostile work environment. As relevant here, the appellant was employed by the agency as a Supervisory Special Agent with the agency's Drug Enforcement Administration (DEA). Prior to filing the instant appeal, the appellant had filed two USERRA appeals and an equal employment opportunity (EEO) complaint. The appellant alleged that, in 2014, upon returning to his car from a deposition in his EEO case at DEA headquarters, he found a purported agency Blackberry under the hood of his car, which he posits the agency intended to use as a tracking device. The Blackberry issue became the subject of investigations by the agency's Office of Professional Responsibility (OPR). In connection with that investigation, the agency directed the appellant to appear for an OPR interview; however, he did not do so. The agency took no action against him based on his failure to appear.

Holding: USERRA's anti-retaliation provision, 38 U.S.C. § 4311(b), encompasses a hostile work environment claim to the extent that the hostile work environment amounts to a denial of a benefit of employment.

1. The Board summarily affirmed the undisputed finding that the appellant engaged in activity protected under 38 U.S.C. § 4311(b) by filing two previous USERRA appeals. It instead focused on whether the appellant's hostile work environment claim was cognizable under section 4311(b) and concluded that it was. The Board recognized that harassment "sufficiently pervasive to alter the conditions of employment and create an abusive working environment" violates USERRA's anti-discrimination provision, 38 U.S.C. § 4311(a), and found it appropriate to similarly

construe section 4311(b) based on the legislative history and the remedial purpose of the USERRA statute. Moreover, the Board found persuasive Federal courts' holdings that hostile work environment claims may be pursued under other similar anti-retaliation provisions, including under Title VII and the Whistleblower Protection Enhancement Act of 2012. The Board also relied on the Federal Circuit's remand of the appellant's section 4311(b) claim as further support for this finding.

2. Thus, the Board held that USERRA's anti-retaliation provision encompasses a hostile work environment claim to the extent that a hostile work environment amounts to a denial of a benefit of employment. Benefits of employment, as defined by 38 U.S.C. § 4303(2), are "the terms, conditions, or privileges of employment." To establish jurisdiction over a hostile work environment claim arising under section 4311(b), an appellant must nonfrivolously allege that (1) "he was subjected to a pattern of ongoing and persistent harassing behavior that was sufficiently severe or pervasive to amount to an 'adverse employment action' or 'discriminat[ion] in employment;'" and (2) his protected activity was a motivating factor in the alleged acts of hostility. Such allegations are to be liberally construed.
3. The Board found that the appellant did not nonfrivolously allege a hostile work environment. The two instances he identified were the agency's alleged planting of the Blackberry device on his vehicle and being summoned by OPR for an interview. The Federal Circuit already concluded in the prior proceedings, with regard to his section 4311(a) USERRA discrimination claim, that those actions, individually or collectively, did not constitute "adverse employment actions" or "discrimination in employment."

Accordingly, the Board affirmed the administrative judge's dismissal of the appeal for lack of jurisdiction.

Appellant: Aimee Karnes

Agency: Department of Justice

Decision Number: [2023 MSPB 12](#)

Docket Number: DA-1221-21-0009-W-1

Issuance Date: March 20, 2023

Appeal Type: Individual Right of Action (IRA)

CONTRIBUTING FACTOR

CLEAR AND CONVINCING EVIDENCE

CORRECTIVE ACTION

The appellant was employed by the agency as a GS-13 Administrative Officer at the U.S. Marshal Service's Eastern District of Oklahoma (EDOK). In July and August 2019, she made the following disclosures about her first-level supervisor to the agency's Investigation Coordinator: (1) he improperly sold Government property for scrap metal and used the proceeds for a coffee and water fund; and (2) he fabricated his timecards. Thereafter, the Investigation Coordinator contacted the Office of Special Counsel (OSC) on the appellant's behalf, the appellant filed an anonymous disclosure complaint with OSC, and OSC contacted the agency, prompting the agency to open an internal affairs (IA) review, concerning the appellant's disclosures. Following the IA investigation, the Deputy Director of the U.S. Marshal Service assembled and sent a District Assessment Team (DAT) to investigate the work climate in the EDOK office. DAT issued a report, finding that the office was divided into two factions aligning with the appellant and her first-level supervisor, respectively. The DAT recommended, *inter alia*, that the appellant and the Investigation Coordinator be reassigned to another district. Consistent therewith, the Deputy Director issued the appellant a management directed reassignment (MDR) to a Budget Analyst position in Arlington, Virginia. The appellant accepted the MDR under protest. The appellant filed an OSC complaint and, after OSC closed the complaint, an IRA appeal with the Board.

After holding the appellant's requested hearing, the administrative judge issued an initial decision finding that the appellant established a prima facie case of reprisal and that the agency failed to meet its burden of showing by clear and convincing evidence that it would have reassigned the appellant absent her protected activity. The administrative judge therefore granted the appellant's request for corrective action and ordered the agency to reassign the appellant to her former position. The agency filed a petition for review of the initial decision. The Board denied the agency's petition for review and affirmed the initial decision except to modify the administrative judge's analysis of the factors set forth in *Carr v. Social Security Administration*, 185 F.3d 1318, 1323 (Fed. Cir. 1999).

Holding: The administrative judge properly found that the appellant established that her protected activity was a contributing factor in the agency's MDR decision.

1. The Board affirmed the administrative judge's unchallenged finding that the appellant's filing of her anonymous 2019 complaint with OSC's Disclosure Unit constituted protected activity under 5 U.S.C. § 2302(b)(9)(C), regardless of its content. Further, the MDR was an action covered under 5 U.S.C. § 2302(a)(2)(A)(iv).
2. The Board recognized that the administrative judge applied the "cat's

paw” theory in finding that the appellant proved the contributing factor element of her prima facie case. Thereunder, “an appellant can establish that a prohibited animus toward a whistleblower was a contributing factor in a personnel action by showing by preponderant evidence that an individual with knowledge of the protected disclosure influenced the officials who are accused of taking the personnel actions.”

3. The administrative judge found, based on the record and implicit demeanor-based credibility determinations, that the appellant’s first-level supervisor had constructive knowledge of the appellant’s OSC complaint and influenced the DAT’s recommendation and the Deputy Director’s decision to reassign the appellant; therefore, although the DAT and Deputy Director lacked actual knowledge, they had constructive knowledge of the appellant’s OSC complaint.
4. The agency argued that the administrative judge’s finding was based on the appellant’s mere speculation that her first-level supervisor believed she had filed the OSC complaint, not credible evidence. However, the Board agreed with the administrative judge that, based on the evidence, it was more likely than not that the appellant’s first-level supervisor knew of the OSC complaint given the specific subject of the appellant’s complaint and its direct relation to the appellant’s duties, the appellant’s history of raising such issues, and corroborating testimony from the DAT members.
5. The Board also found no error in the administrative judge’s conclusions that the DAT and Deputy Director were influenced by the first-level supervisor’s recommendation to reassign both the appellant and the Investigation Coordinator, and that the appellant’s OSC complaint, the investigation, and the MDR all occurred in a close period of time, thereby supporting a finding that retaliatory animus contributed to the appellant’s MDR. The Board agreed that the appellant made a prima facie case of reprisal.
6. The Board also rejected the agency’s argument that, to support a cat’s paw theory, the influencing individual must have had actual knowledge of the protected disclosure or activity, i.e., the appellant had to prove that her first-level supervisor had actual knowledge of her OSC complaint to prevail on that theory. The Board reaffirmed that contributing factor can be established by a showing that the influencing official had actual *or* constructive knowledge of the disclosure.

Holding: The administrative judge erred in finding that the first and third *Carr* factors cut against the agency but properly found that the agency did not establish by clear and convincing evidence that it would have

reassigned the appellant absent her protected activity.

1. The agency challenged the administrative judge's finding that the first *Carr* factor, i.e., the strength of the agency's evidence in support of the action, cut against the agency. The Board agreed with the agency, finding that it offered valid reasons and evidence showing that the DAT recommended, and the Deputy Director effected, the appellant's reassignment because of her role in creating office "turmoil." The administrative judge's approach was overly formulaic, did not account for the evidence as a whole, and improperly discounted the agency's evidence in support of its reassignment decision. The Board therefore found that this factor weighed in the agency's favor.
2. As to the second *Carr* factor, the Board agreed with the administrative judge's finding that it weighed heavily against the agency. The appellant's first-line supervisor displayed strong retaliatory animus against the appellant for implicating him in her OSC complaint and against whistleblowers in general, given his recommendation to not only reassign the appellant but also the Investigation Coordinator.
3. As to the third *Carr* factor, the Board disagreed with the administrative judge's finding that it cut against the agency. The third *Carr* factor requires consideration of evidence that the agency takes similar actions against employees who are not whistleblowers but who are otherwise similarly situated. The Board found that the third *Carr* factor was neutral given the "complete absence" of evidence that the agency treated similarly-situated non-whistleblowers differently.
4. In weighing the first and second factors, the Board found that the strength of the first-level supervisor's motive to retaliate outweighed the fact that the agency may have had valid reasons for reassigning the appellant. The Board, therefore, agreed with the administrative judge's conclusion that the agency failed to meet its burden.

Accordingly, the Board affirmed the initial decision ordering corrective action.